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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

HYDROLEVEL CORPORATION,
Petitioner,

v.

AMERICAN SOCIETY OF
MECHANICAL ENGINEERS, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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April 22, 1981

QUESTIONS PRESENTED

1. Whether a key participant in a conspiracy to exclude another from a market can avoid liability for the ultimate effect of his own prior acts in furtherance of the conspiracy by issuing a "suitable retraction."

2. Whether the Court of Appeals erred in holding, *sua sponte,* that a letter issued by a defendant-conspirator constituted a "suitable retraction" of the conspirator's conduct in furtherance of the conspiracy even though the defendant-conspirator never pleaded or argued a theory of "retraction" or "withdrawal" throughout the entire district court and appellate proceedings.

3. Whether, as a matter of law, a letter that "confirmed the intent" of the original unlawful act can constitute a "suitable retraction."

4. Whether the Court of Appeals erred in concluding that the jury's $3.3 million damage award, based upon expert testimony that the plaintiff would have achieved a 10%-25% market share "but for" the conspiracy, was "excessive" because the defendant was "far [less] culpable" than two co-conspirators who had settled with the plaintiff for $800,000 and because the plaintiff had never succeeded in making a profit or in achieving a market share of more than 1%, although:

(a) the plaintiff's damage calculations were prepared pursuant to traditional methods repeatedly enunciated by this Court for estimating the damages of a plaintiff unlawfully excluded from a market;

(b) the plaintiff's damage calculations were admitted into evidence without objection; and

(c) the jury's award was in the range expressly approved as reasonable by the defendant's own damage expert.

THE PARTIES IN THE COURT OF APPEALS

1. Petitioner is the Hydrolevel Corporation.

2. Respondent is American Society of Mechanical Engineers, Inc.

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Petitioner Hydrolevel Corporation ("Hydrolevel") respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Second Circuit reversing a jury verdict of $3.3 million which Judge Jack B. Weinstein, after trial in the United States District Court for the Eastern District of New York, reduced to $2.5 million to account for $800,000 already paid in settlements by the two other co-conspirator defendants.

OPINION BELOW

The opinion of the Court of Appeals appears at 635 F.2d 118 (2d Cir. 1981) and is reproduced in the Appendix to this petition at pages 1a to 26a.

JURISDICTION

The opinion of the Court of Appeals was entered on November 24, 1980. A timely petition for rehearing, with a suggestion for rehearing *en banc*, was filed by Hydrolevel and was denied on January 22, 1981. A copy of the order of the Court of Appeals denying the petition for rehearing is reproduced in the Appendix at page 27a. The instant petition is filed within ninety (90) days of that date. This Court has jurisdiction to review the judgment in question by writ of certiorari under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether a key participant in a conspiracy to exclude another from a market can avoid liability for the ultimate effect of his own prior acts in furtherance of the conspiracy by issuing a "suitable retraction."

2. Whether the Court of Appeals erred in holding, *sua sponte*, that a letter issued by a defendant-conspirator constituted a "suitable retraction" of the conspirator's conduct in furtherance of the conspiracy even though the defendant-conspirator never pleaded or argued a theory of "retraction" or "withdrawal" throughout the entire district court and appellate proceedings.

3. Whether, as a matter of law, a letter that "confirmed the intent" of the original unlawful act can constitute a "suitable retraction."

4. Whether the Court of Appeals erred in concluding that the jury's $3.3 million damage award, based upon expert testimony that the plaintiff would have achieved a 10%-25% market share "but for" the conspiracy, was "excessive" because the defendant was "far [less] culpable" than two co-conspirators who had settled with the plaintiff for $800,000 and because the plaintiff had never succeeded in making a profit or in achieving a market share of more than 1%, although:

(a) the plaintiff's damage calculations were prepared pursuant to traditional methods repeatedly enunciated by this Court for estimating the damages of a plaintiff unlawfully excluded from a market;

(b) the plaintiff's damage calculations were admitted into evidence without objection; and

(c) the jury's award was in the range expressly approved as reasonable by the defendant's own damage expert.

STATUTES INVOLVED

Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, and Section 4 of the Clayton Act, 15 U.S.C. § 15, are set forth, in relevant part, in the Appendix to this petition at pages 28a and 29a.

STATEMENT OF THE CASE

This action was instituted in August of 1975 by petitioner Hydrolevel Corporation ("Hydrolevel") against respondent The American Society of Mechanical Engineers, Inc. ("ASME"), and against the International Telephone & Telegraph Corporation ("ITT") and Hartford Steam Boiler Inspection and Insurance Company ("Hartford Steam"). The Complaint charged that the defendants conspired to restrain trade and to monopolize the United States market for boiler water level controls in violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2. Prior to trial, at a time when Hydrolevel was struggling to remain viable, ITT and Hartford Steam settled with Hydrolevel for a total of $800,000. In January 1979, a few weeks before the trial began, Hydrolevel ceased operations and was liquidated.

Trial on the issues of liability and damages was bifurcated by United States District Judge Jack B. Weinstein and the jury returned a verdict in favor of Hydrolevel on each issue, fixing Hydrolevel's damages at $3.3 million. The district court reduced this amount, prior to trebling, by the $800,000 paid by ITT and Hartford Steam in their settlements, resulting in an after-trebling final judgment of $7.5 million against ASME. The district court subsequently denied ASME's motion for judgment notwithstanding the verdict and for a new trial, and denied Hydrolevel's request for the award of an attorney's fee. Cross-appeals were taken to the United States Court of Appeals for the Second Circuit, which affirmed the district court's judgment as to liability but reversed the damage award and the denial of attorneys' fees and remanded the case to the district court for a new trial limited to damages.

Hydrolevel was organized in 1965 for the purpose of manufacturing and marketing a "probe" type boiler water level control developed by one of the company's founders.[1] This device, which incorporated certain patented features and had no moving parts, represented a dramatic departure from existing technology in the field and filled a clear need for innovation and competition in the boiler water level control industry. A single manufacturer, McDonnell & Miller, Inc.,[2] had dominated the market for decades, accounting for up to 85% of industry sales with a product operating on the "float" principle, much like the bulb in the tank of the household commode. The M&M/ITT product had been experiencing a relatively high rate of failures, frequently resulting in boiler explosions or dry-firing and causing serious personal and property damage. There was uncontroverted evidence before the jury that the

[1] A boiler water level control monitors the level of water in a steam or hot water boiler and cuts off the boiler's fuel supply when the water level drops below a predetermined point. The "probe" type control utilizes the presence of water in the boiler to complete an electrical circuit; when the water level falls below the "probe" the circuit is broken and the fuel supply is shut off.

[2] In December 1971, McDonnell & Miller was acquired by ITT. (Hereinafter reference will be made to "M&M/ITT").

"probe" concept, and Hydrolevel's product, was simpler, cheaper to manufacture and — most important — more reliable than the M&M/ITT "float" control.

The ASME is a technical society which, among other activities, has taken upon itself the responsibility for promulgating and, to a certain extent, policing "voluntary" standards for the design, maintenance and performance of certain industrial and commercial equipment, including boilers and pressure vessels. The Boiler and Pressure Vessel Committee of ASME (hereinafter the "Main Committee") has formulated and issued a "Boiler and Pressure Vessel Code" (hereinafter the "Code") as such a standard. Section IV of that Code sets forth certain requirements for boiler controls, including boiler water level controls such as those manufactured by Hydrolevel and M&M/ITT. Because this and other similar ASME codes have been incorporated by reference into the laws of numerous local, state and federal jurisdictions, a product deemed not to be in compliance with the Code is virtually unmarketable in the United States.

Since the Code is in need of occasional revision and interpretation, the Main Committee has established subcommittees to perform such functions. These subcommittees are made up of officials of companies engaged in the various related industries and are assisted by full-time staff employees of the ASME. At the time Hydrolevel was attempting to break into the boiler control market, senior officials of M&M/ITT and Hartford Steam (which was also affiliated with ITT) held the strategic positions of Chairman and Vice-Chairman of the Section IV Heating Boiler Subcommittee, the subcommittee having jurisdiction over the interpretation of Code provisions relating to boiler controls. Officials of no other boiler water level control manufacturer had ever been members of this particular subcommittee or, for that matter, of its parent, the Main Committee.

In early 1971, after five years of exploratory sales efforts and product refinement (during which it was loyally supported by its lender, a venture capital affiliate of the Chase Manhattan Bank), Hydrolevel achieved a sales breakthrough. Brooklyn

Union Gas Company, a major gas utility and gas appliance retailer in the New York metropolitan area, concluded in late February 1971, after exhaustive in-house testing, that it would specify the Hydrolevel "probe" control for use on *all* Brooklyn Union boilers, replacing the M&M/ITT "float" control. Brooklyn Union purchased, on a wholesale basis, large quantities of residential and commercial boilers from three or four leading manufacturers. Such a dramatic switch in product specification by a major customer in the industry threatened to cause the entire boiler industry to re-evaluate its long-standing reliance on the "float" sold by M&M/ITT.

In early April 1971, and within several weeks of Brooklyn Union's decision, a meeting was held in Chicago, ostensibly to discuss whether the Hydrolevel product met the requirements of the ASME Code. The meeting was attended by the two officers of M&M/ITT and Hartford Steam, John James and T. R. Hardin, who held the senior positions on the ASME's Heating Boilers Subcommittee, and two other top executives from M&M/ITT, Eugene Mitchell, the Company's Vice President in charge of sales, and James Solon, the President of M&M/ITT. These men concocted a scheme to protect M&M/ITT's monopoly position in the market by having the ASME raise doubts as to the ability of Hydrolevel's product to satisfy the standards of the Code. A letter of "inquiry" was drafted by these individuals and submitted to the ASME staff, which routed the letter back to one of the original drafters for response. The resulting "official" ASME interpretative letter, dated April 29, 1971, was carefully worded to imply that the Hydrolevel product did not satisfy the Code.

The letter was widely distributed to, and discussed with, potential boiler water level control purchasers by M&M/ITT and was cited as evidence that the Hydrolevel product did not "meet the Code." As would be expected in an industry that regarded disapproval by the ASME as something akin to the mark of Cain, the Hydrolevel control did not thereafter achieve the wide acceptance in the U.S. market that the evidence showed, and that the jury found, would otherwise have followed the Brooklyn Union decision to "standardize" on Hydrolevel. By contrast, the record is uncontroverted that in Canada,

where the ASME letter was not circulated, Hydrolevel's probe displaced M&M/ITT's float as the dominant product. Indeed, in 1974, having obtained the necessary lead-time by use of the ASME letter, M&M/ITT *itself* developed a "probe" control by "inventing around" Hydrolevel's patents and is today successfully marketing what is essentially a copy of Hydrolevel's control.

In January 1972, upon learning of the existence of the April 29, 1971, ASME letter, Hydrolevel demanded that the ASME provide it a complete copy of the letter. For reasons of "policy," the ASME refused. Nevertheless, after seeing only a portion of the letter, Hydrolevel complained to the ASME that the letter was causing grievous and perhaps irreparable damage to Hydrolevel in the marketplace. Hydrolevel asked the ASME to send a corrective letter to all those in the industry who could reasonably have been expected to hear of the original April 1971 letter and its purported interpretation of the Code.

The Main ASME Committee prepared a draft letter responding to the Hydrolevel request which was written in part by the very same M&M/ITT executive responsible for the original April 1971 ASME letter, John James. The first paragraph of this draft (not quoted in the Court of Appeals' opinion) "confirmed the intent" of the original letter, was couched in technical language and made no reference to Hydrolevel by name or to the original letter. The draft was circulated as the sixth appendix to over fifty (50) pages of Committee minutes solely to the ninety-two (92) organizations who had representatives in attendance at a Main Committee meeting held in May 1972. Of the individuals receiving the draft letter, only *one* was a representative of a substantial, potential direct purchaser of boiler controls.[3] The draft was finalized on June 9, 1972, without substantive change and sent *only to Hydrolevel.* The ASME refused Hydrolevel's request

[3] Apparently relying upon a false statement in the ASME's reply brief, the Court of Appeals incorrectly concluded that this draft letter was "sent to over 300 people active in the boiler market." App. 23a. There is no support for this statement in the record.

that a "corrective statement" be printed in the ASME magazine to reach as many people in the trade as possible.

It was this June 1972 letter that the Court of Appeals repeatedly characterized as the "retraction" by the ASME which allowed the ASME to escape liability for the damage caused by its prior conspiratorial conduct but suffered by Hydrolevel *after* the "retraction."

As noted above, the jury found that the ASME had participated in a conspiracy to restrain trade and to monopolize the market, the objective of which was to exclude Hydrolevel from the market. The ASME's defense was based solely upon an argument that it should not be held liable for the acts of its Committee officers, a contention properly rejected by the Court of Appeals. *At no time during the district court or appellate proceedings did the ASME ever plead, argue or offer any evidence to support a claim that the June 1972 letter constituted a "retraction" of the original April 1971 ASME letter or that the ASME had "withdrawn" from the conspiracy.* Nevertheless, acting *sua sponte,* the Court of Appeals apparently decided that the ASME should not be held responsible for Hydrolevel's demise because it had "retracted" its role in the conspiracy before the plaintiff went out of business.

During the damage phase of the trial, Hydrolevel introduced evidence (through the testimony of three expert witnesses) that the damages to Hydrolevel resulting from the ASME's conspiratorial conduct ranged from $5.3 million to $7.6 million. These estimates were based upon several independent but complementary methods of calculation and followed the experts' conclusion that, "but for" the conspiracy and the ASME's April 1971 letter, Hydrolevel would have achieved a market share of between 10% and 25%. As noted above, in Canada, where the market was "untainted" by the conspiracy, Hydrolevel had achieved a far larger market share. *The ASME did not object to the introduction of this evidence.* Although the ASME's only damage witness criticized the calculations made by Hydrolevel's experts, he candidly acknowledged that the theories underlying them were proper and were generally accepted methods for calculating antitrust damages. Most

significantly, the ASME's damage expert testified that the appropriate damage award could range up to the lowest estimate put forward by the Hydrolevel experts, or $5.3 million.

After the district court charged the jury with the ASME's own proposed charge, the jury returned a verdict in favor of Hydrolevel in the amount of $3.3 million, a figure less than two-thirds of the lowest of the estimates provided by Hydrolevel's witnesses.[4]

In reversing the jury's damage award and remanding the case for a new trial on damages, the Court of Appeals relied primarily upon its holding that, as a matter of law, the ASME could "retract" its original conspiratorial conduct to avoid further liability, apparently even for continuing damage caused by its prior acts, and that the June 1972 letter constituted such a "retraction." The Court of Appeals also concluded that the award was "excessive" because M&M/ITT and Hartford Steam were "far more culpable than ASME" in the conspiracy, noting that "the matter of contribution among joint tortfeasors in antitrust suits is before the Supreme Court . . . ." App. 26a. The facts that Hydrolevel operated at a loss during its entire existence and "never at anytime reached 1% of the market,"[5] in the Court's view, made the damage estimates of Hydrolevel's experts "open to serious question." App. 22a. The Court reasoned that no further analysis was required because the ASME's liability for damages "caused Hydrolevel by the conspiracy" extended only to the period prior to the "retraction" and a "reasonable time" thereafter. The Court held that:

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[4] At the hearing on ASME's motion for judgment notwithstanding the verdict, Judge Weinstein observed that, although he would not have found damages in the amount awarded by the jury, he would not overturn the verdict in the face of the overwhelming evidence in the case supporting the jury's award, including the admission by the ASME's own witness that the amount awarded by the jury was in the range of reasonableness.

[5] These observations were not entirely accurate. The record is uncontradicted that in 1978 Hydrolevel did earn a small profit and that from 1972 until the date of trial Hydrolevel's market penetration ranged between 1% and 1.5%.

> a suitable retraction of the misinterpretation in the April 1971 letter was all that was required to free it from further liability for any damages caused by the conspiracy. Thus, [ASME's] responsibility for damages was at an end when it provided Hydrolevel with the means of correcting the false impressions caused by the April 1971 letter which M&M had been using.

App. at 23a.

REASONS FOR GRANTING THE WRIT

I. The Holding of the Court of Appeals Is Inconsistent With Established Principles Enunciated by this Court Governing the Liability of a Conspirator for the Damage Caused by the Conspiracy.

In order to overturn the jury's award of damages, which the Court of Appeals considered disproportionate to the ASME's role in the unlawful conspiracy (App. 26a), and noting that the matter of contribution among joint tortfeasors in antitrust suits was before this Court in *Texas Industries Inc. v. Radcliffe Materials,* 604 F.2d 897 (5th Cir. 1979), *cert. granted,* 101 S. Ct. 351 (1980) (No. 79-1144), the Court, *sua sponte,* fashioned a new rule of law by allocating among conspirators according to their relative culpability the liability for damages caused by their conspiracy. Although enunciated in an antitrust case, this new rule is applicable to all types of conspiracy cases. According to the Court of Appeals, a conspirator can avoid liability for the effects of the conspiracy simply by giving the victim a "suitable retraction" of the conspirator's original unlawful conduct. Such a "retraction" would apparently be sufficient to end a conspirator's "responsibility for damages," even for the damage continuing to flow from the pre-"retraction" acts of the conspirators. This new legal theory, which was not advanced by ASME at trial or on appeal and is not supported by citation to any authority, is inconsistent with several decisions of this Court and presents an issue of such importance to the future application of the nation's antitrust and conspiracy laws that the issuance of a writ of certiorari to review the opinion of the Court of Appeals is warranted.

(a) The Court of Appeals' Opinion Undermines the Concept of Joint and Several Liability Among Joint Tortfeasors.

It is well established that every participant in a conspiracy is liable for all of the reasonably foreseeable damage flowing from the conspiracy.

> Those of the wrongdoers who are sued together and found guilty in an action of tort are liable for the whole injury to plaintiff, without examining the question of the different degrees of culpability. And if but one is sued, he is liable for all the damages inflicted by the most culpable.

Washington Gaslight Co. v. Lansden, 172 U.S. 534, 552 (1899). The district court's instruction to the jury was entirely consistent with this standard, a standard which the ASME's own proposed instructions incorporated and which the Court of Appeals now rejects.

By comparing the relative "culpability" of the ASME to that of the settling conspirators and determining that the ASME should not bear the full burden of liability for the destruction of the plaintiff's business, the Court of Appeals has gone beyond the matter of contribution among antitrust conspirators which is currently before this Court. In effect, the Court has ordered the *victim* to "contribute" to the "less culpable" conspirator by receiving less than the full measure of its damage caused by the conspiracy whenever that conspirator has furnished the victim a "suitable retraction" before the full impact of the conspiracy has been felt.[6] This *ex post facto* revision of the long-established

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[6] The Court's conclusion that the ASME would be unfairly penalized if it had to bear the burden of the entire damage caused Hydrolevel because the April 1971 letter was its sole contribution to the conspiracy is difficult to reconcile with the most fundamental principle in our legal system that one who causes an injury, even if through a momentary act of negligence, is responsible for the damage caused, *no matter how great.* The uncontroverted evidence before the jury showed, and the Court of Appeals does not question, that it was the ASME's April 1971 letter that led directly to Hydrolevel's ultimate failure.

legal principle of joint and several liability has clearly compromised Hydrolevel's right to be made whole because Hydrolevel's willingness to settle with M&M/ITT and Hartford for substantially less than the full damage it suffered was based upon the assumption that it could proceed against the ASME for the difference between the settlement figure and the total amount of its damages. This new rule of "comparative culpability" not only will clearly discourage future plaintiffs from settling with some, but not all, conspirators, but also will encourage defendants to litigate fully the issue of relative culpability.

(b) The Court of Appeals' New "Retraction" Theory Is Contrary to Long-Standing Principles Governing the Defense of "Withdrawal" in Conspiracy Cases.

The only way in which a conspirator has ever been able to avoid full liability for any of the consequences of a conspiracy once it has been set in motion is to withdraw from the conspiracy. *Levine v. United States,* 383 U.S. 265, 266 (1966) (per curiam). There is no other means of mitigating a conspirator's liability. Withdrawal, however, has never been held to immunize the conspirator from liability for damage flowing from acts he performed in furtherance of the conspiracy because, by definition, those acts were performed at a time *prior* to withdrawal, even though the resulting damage may not have occurred until later. Moreover, the defense of withdrawal must be pleaded and affirmative proof by the defendant of an effective withdrawal is required. The requirements necessary to demonstrate a withdrawal were defined by this Court in *Hyde v. United States,* 225 U.S. 347, 369 (1912), which held that a conspirator must have performed some affirmative and unequivocal act to effectively disavow or defeat the purpose of the conspiracy in order to effectively withdraw from the conspiracy. In the absence of such definite proof of such a positive and unequivocably communicated withdrawal, it will not be presumed. These principles have been followed in every circuit, including the Second Circuit. *See, e.g., United States* v. *James,* 609 F.2d 36 (2d Cir. 1979), *cert. denied,* 445 U.S. 905 (1980).

The decision of the Second Circuit in this case, which does not mention the concept of withdrawal from a conspiracy,

establishes a new and infinitely easier way for a conspirator to avoid the consequences of his unlawful activity and is in direct conflict with the entire body of law regarding withdrawals from conspiracies. Indeed, in derogation of all prior precedent on the subject, the Court of Appeals' new defense expressly places the burden of proof (or actually disproof) concerning the effectiveness of the "retraction" upon the victim, not upon the conspirator, and apparently holds that the "retraction" absolves the conspirator from responsibility for subsequent damage caused by the conspirator's acts performed prior to the "retraction."[7]

(c) The Decision of the Court of Appeals Is Inconsistent With the Basic Objectives of the Antitrust Laws.

The federal antitrust laws are designed to promote and protect a free and competitive economy by compensating victims of anticompetitive activity, by depriving those who violate the law of the fruits of their illegal acts, and by punishing violators with criminal and treble-damage liability in order to deter future anticompetitive acts. *Illinois Brick Co. v. Illinois,* 431 U.S. 720, 746 (1977).

The opinion of the Court of Appeals in this case subverts each of these objectives and is fundamentally inconsistent with

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[7] By choosing to characterize the June 1972 letter as a "retraction" the Court of Appeals has engrafted a concept from the law of libel onto the antitrust laws. However, even the law of libel requires far more of a "retraction" than the Court of Appeals required of the ASME for it to avoid liability. It is well settled that in order for a "retraction" to be effective it must be

> a full and unequivocal one, which does not contain lurking insinuations, hypothetical or hesitant withdrawals, or new calumnies in disguise. It must, in short, be an honest endeavor to repair all of the wrong done by the defamatory imputation, or it will merely aggravate the original offense.

W. Prosser, *Handbook of the Law of Torts* 827 (3d ed. 1964) (footnotes omitted). Moreover, a retraction of a libelous statement may be shown in mitigation of the damages incurred by a plaintiff, but not as a total avoidance of liability, as suggested by the Court of Appeals.

all of them. If, as this Court has said, a plaintiff who is *in pari delicto* with the defendant is a worthy representative of the public interest in seeking treble damages, so too should Hydrolevel be entitled to its full measure of damage from the effect of a conspiracy.

> The plaintiff who reaps the reward of treble damages may be no less morally reprehensible than the defendant, but the law encourages his suit to further the overriding public policy in favor of competition. A more fastidious regard for the relative moral worth of the parties would only result in seriously undermining the usefulness of the private action as a bulwark of antitrust enforcement.

Perma Life Mufflers, Inc. v. Int'l Parts Corp., 392 U.S. 134, 139 (1968).

In view of the deep and abiding interest of the *public* in a competitive economy, and in view of the clear congressional mandate that private antitrust enforcement is a critically important method of guaranteeing this public goal, it was plain error for the Court of Appeals to fashion a new rule permitting antitrust conspirators to "retract" their contributions to an ongoing conspiracy. Unlike the law governing responsibility for libelous statements, which is designed solely to remedy a private wrong, the public has an interest in the deterrent value of the antitrust laws. The Court of Appeals, by weighing the relative culpability of the conspirators and by injecting libel law concepts into the antitrust laws, has chosen to ignore that Congressional mandate.

II. The Conclusion of the Court of Appeals That the Jury's Award of Damages Was "Excessive" Was Improper and Inconsistent With Prior Decisions of this Court.

This Court has consistently held that the standard of appellate review of jury damage awards, where the district court has denied a motion to set aside the verdict as excessive, is whether the verdict is so high as to shock the judicial conscience *and* to constitute a denial of justice. *E.g., Grunenthal v. Long Island R.R. Co.*, 393 U.S. 156, 159 (1968); *Tennant v. Peoria & Pekin Union Ry. Co.*, 321 U.S. 29, 35 (1944). It is important to

note that the Court of Appeals in this case did *not* make such findings; nor did it find that Judge Weinstein had erred or had abused his discretion in denying the ASME's post-trial motion to set aside the award as unsupported by the evidence or as the result of "passion and prejudice." Indeed, the record would have supported a higher award, as conceded by ASME's own expert.

Although it did not find that the record failed to support the award, the Second Circuit's opinion did suggest that the jury's award resulted from "uncertainties and errors" in Hydrolevel's evidence, focusing upon two aspects of the plaintiff's presentation. First, the panel apparently concluded that the fact that Hydrolevel had operated at a loss throughout its existence somehow made the estimate of lost future profits "tenuous." The panel also criticized the estimates of Hydrolevel's ultimate market share "but for" the effects of the conspiracy (ranging from 10% to 25%) on the ground that Hydrolevel had not achieved 1% of the market before it was liquidated.

While these criticisms were not the expressed basis for the panel's reversal of the damage award, it is clear that they underlie the Court of Appeals' novel "retraction" theory and, moreover, are irreconcilable with this Court's decisions in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321 (1971); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100 (1969); and *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946). As these cases emphasize, there will *always* be "uncertainties and errors" in any assessment of the damage suffered by a firm unlawfully excluded from a market before it can establish a true "track record." This is particularly true when, as here, the plaintiff would have had the only innovative product on the market for a few years while its competition was seeking to "invent around" the new product. Thus Hydrolevel had a wide-open but short-lived "window" through which it could have passed to establish a foothold in the market to erode the monopoly position of M&M/ITT but for the conspiracy. Indeed, the conspirators had slammed the "window" shut before the so-called "retraction" letter ever went out. The

damages apparently contemplated by the Court of Appeals — lost profits for the period between the April 1971 letter and a "reasonable period" beyond the date of the 1972 "retraction" letter — would leave the injured plaintiff with only meager compensation for its destroyed future and would leave the injured public with an unchastized and unrepentant conspirator and a market still controlled by the conspiring monopolist.

In *Bigelow*, this Court specifically recognized the difficulty in determining damages in a market exclusion case and held that "the wrongdoer shall bear the risk of the uncertainty [of proof of damages] which his own wrong has created." 327 U.S. at 265. *Accord, Zenith Radio Corp. v. Hazeltine Research Co., Inc.*, 395 U.S. at 124. Mr. Justice White in *Zenith* cautioned trial and appellate courts that proof of damages in these market exclusion cases "are rarely susceptible of the kind of concrete, detailed proof of injury which is available in other contexts." 395 U.S. at 123. Indeed, a jury is entitled to

> "make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly. In such circumstances, 'juries are allowed to act upon probable and inferential, as well as direct and positive proof.' "

395 U.S. at 124 (quoting from *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. at 264). None of these cases gave the Court of Appeals the authority to weigh its view of the damage evidence against its view of a particular conspirator's culpability.

In Canada, a market untainted by the conspiracy, the Hydrolevel product quickly *took over* the market, a fact undisputed in the record but overlooked by the Court of Appeals' opinion. This is the identical "yardstick" that this Court expressly approved as a measure of damages in the *Zenith* case and which was used as one measure of damages by Hydrolevel's experts. Indeed, the facts in the instant case are a mirror image of those in *Zenith*. There, this Court reinstated a damage award in favor of Zenith for its exclusion from the Canadian market based upon the "yardstick" of its market performance in the U.S., precisely the type of calculation included as one of several theories of damage estimates presented by Hydrolevel's experts.

The Second Circuit's conclusions as to the excessiveness of the jury's damage verdict are unsupported and improper. The imposition of a higher standard of proof of antitrust damages than was required under this Court's decisions in *Bigelow* and *Zenith* alone warrants a review of the Court of Appeals' decision.

CONCLUSION

The opinion of the Court of Appeals, reversing the jury's award of damages, is inconsistent with numerous decisions of this Court. Although the plaintiff's damage calculations were made according to principles repeatedly enunciated by this Court, the estimates of plaintiff's damages were placed before the jury without objection, the jury's ultimate verdict was significantly below the *lowest* of those estimates and in the range specifically acknowledged to be reasonable by the defendant's only expert witness, and the trial court refused to set aside the verdict as excessive and found it to be justified by the evidence, the Court of Appeals weighed both the evidence and the "culpability" of the defendant-conspirator. Finding the jury's award to be "excessive," the Court of Appeals created two new corollaries to the law of conspiracy, *viz*, comparative culpability and the principle of "retraction," so that the final award of damages to Hydrolevel would be in line with its own views of how much the ASME's participation in the conspiracy should require it to pay. Not only is the Court of Appeals' decision an injustice to Hydrolevel, whose efforts as an innovative entrepreneur seeking to penetrate a moribund and monopolistic market were precisely what the antitrust laws were designed to encourage and protect, but it is a serious blow to private antitrust enforcement generally and deserves the attention and consideration of this Court.

For the foregoing reasons, a writ of certiorari should issue to the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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April 22, 1981

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 664-5—September Term, 1979

(Argued March 12, 1980 Decided November 24, 1980)

Docket Nos.: 79-7254, 79-7260

HYDROLEVEL CORPORATION, a New York Corporation,

Plaintiff-Appellee-Cross Appellant,

—against—

THE AMERICAN SOCIETY OF MECHANICAL ENGINEERS, INC., a New York Corporation,

Defendant-Appellant-Cross-Appellee.

Before:

LUMBARD, FRIENDLY, and MESKILL, *Circuit Judges.*

Appeal from a judgment entered on a jury verdict in the United States District Court for the Eastern District of New York, Weinstein, *Judge*, holding appellant, American Society of Mechanical Engineers, liable for conspiracy to restrain trade and awarding appellee,

Hydrolevel Corporation, damages trebled to $7.5 million.

Affirmed in part; reversed and remanded in part.

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LUMBARD, *Circuit Judge:*

The American Society of Mechanical Engineers (ASME) appeals from a judgment of $7.5 million, entered in the Eastern District of New York on February 14, 1979, Judge Weinstein presiding. The jury found that ASME had participated in a conspiracy to restrain trade in violation of § 1 of the Sherman Act, 15 U.S.C. § 1, and assessed damages at $3.3 million. Judge Weinstein deducted from that figure $800,000 paid in settlement by other defendants and then trebled the remainder, awarding total damages of $7.5 million. We affirm

the judgment of liability on a theory different from that of the district court, and remand for a new trial on damages, with instructions regarding the treatment of the settlement payments and the assessment of legal fees.

I. FACTS

ASME is a tax-exempt technical and scientific society founded in 1880 and based in New York. It has more than 90,000 members, drawn from all fields where mechanical engineers are active--including industry, academia, insurance and government—and has an annual operating budget of over $12 million. It conducts educational and research programs, publishes a national magazine devoted to mechanical engineering, and, principally important to this case, promulgates over 400 codes and standards. Those codes have great influence in the profession and the marketplace. Indeed, they have been incorporated by reference into federal, state, and local laws and regulations.[1] Although ASME employs a full-time staff, much of its work is done by volunteers from its membership who participate in ASME as individuals, not as representatives of their employers. Over 10,000 such volunteers participate in the many ASME committees and sub-committees that draft, revise, and interpret ASME's codes. The question in this appeal is whether ASME is liable for the restraint of trade that resulted when two of its highly placed volunteers caused it to issue a misinterpretation of one such code so as to frustrate competition at the expense of Hydrolevel Corporation.

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1 *See, e.g.*, 12 N.Y. Code R. & Reg. §§ 4-1.9, 4-1.10 (1979).

At all relevant times, the Boiler and Pressure Vessel Code set standards for the performance of various components of steam and water boilers and pressure vessels. Section IV of the Code set standards specifically for components of heating boilers, including a device whose name wholly describes its function: the low-water fuel cut-off. If the water inside a boiler drops below a level that is sufficient to moderate the boiler's temperature, the boiler will "dry fire" and can explode. A low-water fuel cut-off cuts off fuel to the boiler, and thus stops it, when the water reaches a certain low point. To ensure that the cut-off operates before the water reaches a dangerously low level, Paragraph HG-605 of Section IV of the Code required that each boiler "have an automatic low-water fuel cut-off so located as to automatically cut off the fuel supply when the surface of the water falls to the lowest visible part of the water-gauge glass" attached to the outside of the boiler.

The leading manufacturer of cut-offs for the last fifty years has been McDonnel & Miller, Inc. (M&M), of Chicago, which annually makes 70%-85% of the sales of "float" cut-offs. The literal nomenclature of this area of mechanical engineering almost wholly explains function: when water in the boiler falls to the critical level, a floating bulb falling with the water trips a switch mechanically linked to the bulb and thus cuts off the fuel. Hydrolevel began in 1965 to manufacture and market a "probe" cut-off which, as its name suggests, penetrates into the water in the boiler. So long as water covers an electrode in the probe, a completed electrical circuit will cause fuel to flow to the boiler; when the water drops below the probe, the circuit is broken and the fuel stops.

Without entering the engineering debate over which kind of cut-off is better, an obviously irrelevant question in this appeal, it must be said that neither was flawless. The one flaw that is relevant was that found in the probe cut-off: because boiling water bubbles and surges inside the boiler, it intermittently falls below the probe and cuts off the fuel although still at a safe level. Hydrolevel therefore incorporated into its probe cut-off a time-delay element that allowed fuel to continue flowing for sixty to ninety seconds after the water fell below the probe. This reduced the fluctuations in the fuel supply caused by bubbling and surging, but still cut off the fuel before the boiler could dry fire if the water actually fell to a critically low point.

In early 1971, a major purchaser of cut-offs, Brooklyn Union Gas Co., had decided to change to Hydrolevel's time-delay probe after years of purchasing M&M's float. At the same time, M&M arranged to use ASME code interpretation procedures to stifle Hydrolevel's competition. John W. James, the Vice-President in charge of Research at M&M, was the Vice-Chairman of the Section IV Subcommittee of ASME which drafted, revised, and interpreted Section IV of the Boiler and Pressure Vessel Code. The Chairman of the Subcommittee was T. R. Hardin, an Executive Vice-President of Hartford Steam Boiler Inspection and Insurance Company (Hartford), the country's leading underwriter of boiler insurance.[2] In March 1971 James and Hardin, along with James Solon, the President of M&M, and Eugene Mitchell, its Vice-President of Sales, decided to send to the

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2 International Telephone and Telegraph had just acquired a controlling interest in Hartford. At the same time, M&M was initiating what were to become successful negotiations to be acquired by the same firm. ITT completed its acquisition of M&M in December of 1971.

Boiler and Pressure Vessel Committee a letter inquiring whether a cut-off with a time-delay met the standard of Paragraph HG-605. James and Hardin drafted a letter of inquiry that they believed would elicit a negative answer. On April 12, Mitchell signed the letter and sent it to W. Bradford Hoyt, the Secretary of the Boiler and Pressure Vessel Committee, who was a full-time ASME officer. The letter asked, after paraphrasing Paragraph HG-605:

> Is it the intent of this statement that the cut-off operate immediately when the boiler water level falls to the lowest visible part of the water-gauge glass, or is it permissible to incorporate a time-delay feature in the cut-off so that it will operate after the boiler water level reaches some point below the visible range of the gauge glass?

As Secretary of the Boiler and Pressure Vessel Committee, Hoyt processed such written inquiries according to § 8 of the Boiler and Pressure Vessel Committee Procedure. Many inquiries could be answered with form letters authorized in § 8.01. For inquiries that could not be answered by a form reply, § 8.02 provided that the "Secretary shall immediately refer such matters to the Chairman of the proper Subcommittee or to a Special Committee appointed by the Chairman or Vice-Chairman in cases where no other procedure is evident." The April 12 inquiry from M&M could not be answered with one of the form letters under § 8.01, so Hoyt referred it under § 8.02 to Hardin, the "Chairman of the proper Subcommittee."

ASME's procedures then put Hardin in unsupervised control of its response to the inquiry. Under § 8.02, an inquiry that could "be answered by direct reference to

the Code" would receive an "unofficial communication" from ASME. In such instances, "the subcommittee or special committee chairman shall outline the reply to be sent by the Secretary." An inquiry that could not be answered with an unofficial communication would receive, under the other subsections of § 8.02, the attention of the entire subcommittee. Hardin, however, treated the April 12 inquiry as one requiring only an unofficial communication and, accordingly, only his attention. ASME provided no review of Hardin's discretion to respond unofficially to the inquiry. He drafted a reply and sent it to Hoyt, who on April 29 sent an answer to Mitchell, which in pertinent part stated as follows:

> A low-water fuel cut-off is considered strictly as a safety device and not as some kind of an operating control. Assuming that the water gauge glass is located in accordance with the requirements of Par. HG-602(b), it is the intent of Par. HG-605(a) that the low-water fuel cut-off operate immediately and positively when the boiler water level falls to the lowest visible part of the water gauge glass.
>
> There are many and varied designs of heating boilers. If a time delay feature were incorporated in a low-water fuel cut-off, there would be no positive assurance that the boiler water level would not fall to a dangerous point during a time delay period.

The second paragraph of this letter does not follow from the first. Whether a cut-off with a time-delay will assure that the water level will not fall dangerously low during the delay depends upon where on the boiler the cut-off is positioned vis-a-vis the water-gauge glass. If

the cut-off is positioned sufficiently above the lowest permissible water level, a cut-off with a time-delay could assure, even allowing for the delay, that the fuel supply would stop by the time the water fell to the lowest visible part of the water-gauge glass. The letter's first paragraph takes the distance between the cut-off and water-gauge glass into account by referring to Paragraph HG-602(b), which sets the location of the water-gauge glass on the boiler. The second paragraph does not take that distance into account and therefore draws its misleading conclusion.

Despite that failure in logic, the ASME answer proved to be valuable M&M propaganda. M&M included a copy of the April 29 answer in its booklet entitled "The Opposition—Who They Are, How to Beat Them," which M&M distributed to its salesmen. Further, a message from Mitchell in the booklet described Hydrolevel's cut-off and its time-delay and stated:

> A time-delay of any kind in the firing device circuitry would very definitely be against the ASME Code which clearly stipulates the firing device must be shut down at the lowest visible portion of the gauge glass. A time delay would defeat the intent of the ASME Code and this should definitely be brought to the attention of anyone considering the device which included a time delay in the low water cut-off circuitry.

Not surprisingly, copies of ASME's April 29 answer soon reached the hands of customers in the cut-off market.

Hydrolevel first learned about the April 29 answer in January, 1972, from an erstwhile customer. Hydrolevel's Vice-President, Dominic DeLeonardis, requested a copy of the letter from Hoyt. On February 8, an Assistant

Secretary of the Boiler and Pressure Vessel Committee, R. D. Sutton, sent to DeLeonardis a letter that quoted both substantive pargraphs of the April 29 answer but did not reveal, pursuant to ASME's policy of maintaining inquirers' anonymity, that the inquirer had been M&M. After seeing the April 29 letter and recognizing its second paragraph as misleading, and believing that ASME itself had distributed the letter to the cut-off market, Hydrolevel's President, Russel Rymer, complained to Hoyt on March 23, 1972 that the letter had seriously impaired Hydrolevel's sales. Rymer urged that ASME send to whomever might have received the letter a statement that a cut-off with a time-delay can meet the Boiler and Pressure Vessel Code. In response, Hoyt placed the matter of the April 29, 1971 letter on the agenda for the next meetings of the Boiler and Pressure Vessel Committee and Subcommittee, May 4 and 5, 1972.

When the Subcommittee met on May 4, James presided, having succeeded to the chairmanship after Hardin resigned. Among many items of business at this meeting, which like all ASME committee and subcommittee meetings was public, the Subcommittee discussed Rymer's complaint. During that discussion James stepped down from the chair. The Subcommittee voted to "confirm the intent of the first paragraph" of the April 29 letter. James reported this recommendation to the Committee meeting on May 5, along with the Subcommittee's recommendations on other matters. The Committee voted to send Hydrolevel an "official communication", rather than simply reaffirm the first paragraph, and it appointed two Committee drafters. The drafters proposed, the Committee approved, and on June 9, 1972 Hoyt sent to Rymer a letter that reversed

the implication of the April 29 answer by stating "there is no intent in Section IV to prohibit the use of low water fuel cutoffs having time delays in order to meet the requirements of Par. HG-605(a)." [3]

Two years later, on July 9, 1974, the *Wall Street Journal* printed an article called "Knocking the Competition—How Rival's Use of 'Industry Code' Report Created Problems for Tiny Company." The article reported Hydrolevel's difficulties in attempting to sell a cut-off which the market still believed did not meet the Code, and it suggested that "a marketing ploy" by M&M had created that belief. It also reported that James had known about the inquiry—but did not report that James in fact had helped draft the inquiry—and it implied that a conflict of interest existed between James's position at M&M and on the Subcommittee.

The article's suggestions of impropriety prompted ASME's Professional Practice Committee to investigate, but it never discovered James's implication in the April 12 inquiry. On the facts before it, the Committee concluded that Hoyt, Hardin, and James had each acted properly. The Committee reopened its investigation, however, in March 1975, after James revealed for the first time, while testifying before the Subcommittee on Antitrust and Monopoly of the Senate Judiciary Committee, that he had helped draft the April 12 inquiry and that he had destroyed his correspondence with Hardin after learning about the *Wall Street Journal* investigation from Hoyt. Upon the advice of ASME's counsel, the Committee deferred further action pending this lawsuit, which Hydrolevel commenced on August

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3 The text of the June 9, 1972 letter is reprinted in Section III of this opinion.

23, 1975, against ASME, M&M, and Hartford. In early 1979, Hydrolevel sold all its assets except this suit for $86,000 salvage value.

M&M settled with Hydrolevel for $725,000; Hartford settled for $75,000, leaving ASME to go to trial alone.[4] The district court first tried the issue of liability, and on January 30, 1979, after a seven-day trial, the jury found that ASME had conspired to restrain trade in the cut-off market. The same jury then heard evidence on the issue of damages. Hydrolevel presented three experts who offered estimates of Hydrolevel's injuries, ranging from $2,358,000 to $7,436,300 based on harms forecast as far in the future as 1988. ASME's only expert witness on damages disputed the methods of computation used by Hydrolevel's experts but offered no alternative damage estimates. ASME's principal defense was that Hydrolevel's losses had been caused by inadequate sales promotion and a defective product rather than by any ASME misrepresentation.

On February 2, 1979, the jury found that Hydrolevel had suffered damages of $3.3 million. Judge Weinstein reduced the damages by the $800,000 settlements to $2.5 million, trebled that, and entered a judgment for $7.5 million. He also denied attorneys' fees for Hydrolevel. ASME appeals from the liability verdict and the damage assessment; Hydrolevel cross-appeals from Judge Weinstein's deduction of settlements before trebling and his refusal to grant attorneys' fees.

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[4] The jury was not told about M&M's and Hartford's settlements, and the district court charged the jury, "Do not speculate on why ITT or Hartford Steam or anybody else, individual or institution, is not in the case. You have only one issue before you. Is this defendant liable? That's all." *See* Fed. R. Evid. 408.

II. LIABILITY.

We affirm the jury's verdict of liability under § 1 of the Sherman Act, a verdict based upon a finding that ASME had conspired with others to restrain trade unreasonably in the low-water cut-off market by disparaging Hydrolevel's cut-off through a misinterpretation of the Boiler and Pressure Vessel Code. Given the effect and intent of the April 29 interpretive letter and its subsequent misuse by M&M, the restraint was surely unreasonable: it intentionally misinterpreted the Code so as to prevent Hydrolevel from selling its product. The more troublesome question, which we also decide in favor of Hydolevel, is whether ASME may be held liable as a conspirator because of the acts of its agents.

Although we affirm the jury's verdict, we do so on a theory different from that embodied in the instructions to the jury. In its Request Number 28, Hydrolevel requested that Judge Weinstein charge the jury that ASME would be responsible for its agents' actions if they acted within the scope of their apparent authority, even if they did not intend to benefit ASME. Judge Weinstein, however, rejected that view and instructed the jury that ASME was not liable for its agents' acts unless (1) ASME ratified those acts or (2) the agents had acted to advance ASME's interests. He charged:

> Now the law holds a corporation responsible for the unlawful act of its agents or officers but only when those unlawful acts are performed within the scope of the authority of the officers and on behalf of the corporation.
>
> . . .

> If the officers or agents act on behalf of interests adverse to the corporation or acted for their own economic benefit or the benefit of another person or corporation, and this action was not ratified or adopted by the defendant, their misconduct cannot be considered that of the corporation with which they are associated.

The argument on this appeal centered on whether the evidence justified a verdict for Hydrolevel under either of the district court's theories. We need not resolve that dispute, for we hold that the district court erred in refusing Hydrolevel's requested jury instruction that incorporated an apparent authority theory.

The district court charged the jury that ASME could be held liable only if the jury found that ASME had ratified the acts of its agents or if the agents had acted to advance ASME's interests. That is the appropriate theory for conventional torts. *See* Restatement (2d) of Agency §§ 235, 236. The conduct at issue here, however, is far closer to the torts discussed in § 247 (defamation); § 248 (interference with business relations); § 257 (misrepresentation); and §§ 261 and 262 (fraud). None of these sections ties the principal's liability to a requirement that the agent act at least in part for the principal's benefit, and several expressly reject such a requirement. See § 257, comment d; § 261, comment a; § 262. Under these sections it is likewise immaterial that the agent knows the transaction to be a sham. *See* § 261, comment a and illustration 3. The leading case holding the principal liable where the agent commits fraud while acting within the scope of his apparent authority, although without intention to benefit the principal, is Mr. Justice Stone's opinion in *Gleason v.*

Seaboard Air Line Co., 278 U.S. 349 (1929), which since then has not been questioned.

The reasons for this stringent treatment of intentional torts are not difficult to find. Such torts arise from and are enhanced by the agent's appearance of authority. Third persons—here the customers to whom M&M's circulated the misleading ASME letter—are entitled to rely on that appearance. Moreover, as stated in § 247, dealing with defamation, the act of the agent "is effective, in part at least, because of the personality" of the principal. Or, as said in § 261, comment a, dealing with fraud:

> [L]iability is based upon the fact that the agent's position facilitates the consummation of the fraud, in that from the point of view of the third person the transaction seems regular on its face and the agent appears to be acting in the ordinary course of the business confided to him.

Imposing liability on the principal will induce greater care to prevent misconduct by agents occupying especially sensitive or responsible positions that invite reliance—a consideration of great importance in cases such as this where misuse of quasi-official standards and codes can so easily injure competitors.

Hardin's conduct here was essentially a fraud, a willful and knowing misrepresentation of the Code. The victims, however, were those customers to whom he knew M&M would circulate the letter as well as, ultimately and most seriously, the plaintiff. This difference from the more usual situation in which the injured party relies directly on the culpable misrepresentations can hardly be material. In *Ricketts v. Pennsylvania R. Co.*, 153 F.2d 757, 759 (2d Cir. 1946), we held that there is

"no distinction in principle" between the situation in which the agent deceives the third person "and one in which the agent deceives, not the third person, but his principal." Alternatively, the tort could be regarded as "injurious falsehood." *See* Prosser, Torts § 128 at 915-26 (4th ed. 1971); Restatement (2d) of Torts § 623A. As to this, the Restatement (2d) of Agency tells us, § 248 comment b, that where "harm to business relations is accomplished by defamation or other methods of untruthful publicity, a servant with apparent authority to make statements binds his employer, irrespective of his motive . . . ."[5]

A conspiracy to restrain trade is so similar to fraud, injurious falsehood, and tortious interference with business relations that application of the Restatement rules governing those torts is appropriate. Moreover, ASME's widespread influence through its Code carries with it a corresponding duty to guard against the misuse of such influence. It is difficult to see how a trade association should be treated any differently than a business competitor, especially when it is the association's standing and influence that makes the conspiracy effective and possible. In a variety of contexts, trade associations are obligated to take suitable precautions to avoid antitrust violations. *See* Symposium, *Trade and Professional*

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5 Again, if Hydrolevel had sued ASME for what the New York courts have called a "prima facie tort," *see* W. Prosser, Torts § 130 at 953-54, we see no possible basis on which a verdict in its favor could properly be disturbed on the ground of lack of authority on the part of Hardin. Hydrolevel originally sought to hold ASME liable for trade libel, tortious interference with business relations, and violation of New York's Donnelly Act, N.Y. Gen. Bus. L. § 340 (McKinney 1968), which proscribes, *inter alia*, agreements for the purpose of establishing or maintaining monopolies and "[f]or the purpose of unlawfully interfering with the free exercise of any activity in the conduct of any business, trade or commerce." With court approval, Hydrolevel abandoned all of its state law claims before trial.

Associations: The Antitrust Combat Zone, 46 Antitrust L.J. 638 (1977). While ASME may have no alternative to staffing its committees with business people having practical knowledge, there is a corresponding duty to be aware of and guard against the temptations thus afforded by inherent conflicts of interest. Absent some internal review procedures, no individual should be empowered to rule dispositively on the fitness of a competitor's product. When an organization has placed a person in a position to do what Hardin did, without any check or supervision, it must bear the consequences.

Two considerations opposing this more stringent rule of liability warrant brief mention: the treble damages provision in § 4 of the Clayton Act and the non-profit, voluntary aspects of trade associations such as ASME. The first consideration suggests that broad agency theories of liability are inappropriate where treble damages are required. For example, in *United States v. Ridglea State Bank*, 357 F.2d 495 (5th Cir. 1966), the court rejected an expansive agency doctrine in a case under the False Claims Act, 31 U.S.C. § 231 et seq. (1976), because the Act's double damages provision provides "a recovery wholly out of proportion to actual loss." 357 F.2d at 500.[6]

In our view, the treble damages accorded under the antitrust laws are distinguishable. In contrast to a private antitrust action, the United States need not suffer actual damages before collecting penalties under

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[6] *See also Asphalt Industries, Inc. v. Commissioner*, 384 F.2d 229 (3d Cir. 1967) (corporation held not liable for tax fraud penalties caused by fraudulent acts of its president against the interest of the corporation). Restatement (2d) Agency § 217C also restricts the imputation of liability for punitive damages but says that the rule there stated does "not apply to the interpretation of special statutes such as those giving triple damages, as to which no statementis made." § 217C, comment c.

the False Claims Act. *See United States v. Cherokee Implement Co.*, 216 F. Supp. 374, 375 (N.D. Iowa 1963), and cases cited therein. The comparatively more punitive False Claims Act award includes not only a double damage remedy but also fixed forfeitures for each violation of the act. *See Ridglea, supra*, 357 F.2d at 499.

Beyond this, restraint of trade was, under the common law, a variety of business tort that was remedied through restitution. *See* Comment, *Private Treble Damage Antitrust Suits: Measure of Damages for Destruction of All or Part of a Business*, 80 Harv. L. Rev. 1566 (1967). *See also Standard Oil Company of New Jersey v. United States*, 211 U.S. 1, 50-69 (1911); *Williamson v. Columbia Gas & Electric Corp.*, 110 F.2d 15, 17-18 (3d Cir. 1940).[7] Full restitution of plaintiffs' losses is a no less central objective of the treble damage provision than the encouragement of private antitrust enforcement. *See Illinois Brick Co. v. Illinois*, 431 U.S. 720, 746-47 (1977); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 485-87 (1977); K. Elzinga & W. Breit, The Antitrust Penalties 66-67 (1966); Comment, *supra*, at 1566-67.

Unlike the False Claims Act penalties, where damages are doubled although the government's losses are readily ascertainable, the trebling of damages under the antitrust laws reflects congressional recongition of the difficulty of proving antitrust damages. *See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., supra*, 429 U.S. at 486 n.10; K. Elzinga & W. Breit, *supra*, at 67; Comment, *supra*, at 1566. Thus, we see no reason why the treble

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[7] The treble damage formula itself seems to have been taken from an early English antimonopoly statute. *See* "An act concerning monopolies and dispensation with penal laws and forfeitures thereof," 21 Jac. I. c. 3 1623; K. Elzinga & W. Breit, The Antitrust Penalties 63-64 (1976).

damage provision of the Clayton Act should compel a restricted view of agency law.

That brings us to the second consideration affecting ASME's liability: whether ASME's unique structure or status should mandate a different result. We conclude that it should not. ASME's reliance on *Coronado Coal Corp. v. United Mine Workers*, 268 U.S. 195 (1925), is misplaced; that decision held that an international union may not be held liable for a Sherman Act violation by leaders of a local where, under the constitution of the International, it could only accept authority for the action by express ratification. *Id.* at 304. ASME's protest that its status as a professional organization requires more flexible treatment than would be accorded an ordinary corporation is similarly unpersuasive. Dicta indicating more flexible and lenient treatment of professional organizations in *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 788-89 (1975), and *National Society of Professional Engineers v. United States*, 435 U.S. 679, 696 (1978), concern the antitrust consequences of such organizations' regulation of their own members. *See generally* Handler, *Antitrust—1978*, 78 Colum. L. Rev. 1363, 1364-68 (1978). The dicta of those cases refer only to uniform regulation of the professional conduct of an association's members. By contrast, this case involves the radically different situation where a professional organization having great economic influence is implicated in a conspiracy to restrain competition to the injury of third parties and the public. *See, e.g., United States v. Hilton Hotels Corp.*, 467 F.2d 1000 (9th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973) (corporation criminally liable for boycott participation by purchasing agent disobeying express instruction and motivated by personal pique against boycott target); *Northern Califor-*

nia Pharmaceutical Ass'n v. United States, 306 F.2d 379-86 (9th Cir. 1962) (professional organization subject to Sherman Act where its activities are of precisely the sort that Act condemns).

For ASME to be liable, then, Hydrolevel had to demonstrate only that ASME's agents acted within their apparent authority when participating in the conspiracy; it did not have to demonstrate that they also acted in part to benefit ASME or that ASME later ratified their actions. The district court's charge required either one of those two additional aspects and consequently was more favorable to ASME than it should have been. As the jury found for Hydrolevel on a charge that was more favorable to the defendant than the law requires, we affirm the judgment on liability.

III. ALLEGED TRIAL ERRORS

ASME argues that several errors at trial require reversal of the jury's liability determination. Principally, ASME asserts that the district court erred in admitting four pieces of evidence: the July 1974 *Wall Street Journal* article that contained a concise and apparently corroborating account of Hydrolevel's charges; references to the FTC and Senate Subcommitee investigations of Hydrolevel's charges; the deposition of John Bonner, the chairman of a plumbing supply company, who had been included in ASME's list of possible expert witnesses but who gave testimony damaging to ASME in his pretrial deposition and was never called at trial; and finally, the alleged hearsay testimony of DeLeonardis on conversations with potential Hydrolevel customers who indicated concern that Hydrolevel's device did not meet ASME requirements. We find no error in the admission of this evidence.

The most serious objection raised by ASME concerns the *Wall Street Journal* article. But, to the extent that the article addressed the circumstances attending M&M's April 12 inquiry and ASME's April 29 response, its account was considerably less damning than the facts developed at trial. More important, the article was admitted only to demonstrate the state of mind of those who reacted to it: Hoyt's advising James about the article and James' response in destroying the ASME correspondence file on the subject were relevant to Hydrolevel's ratification argument. The *Journal* article led the ASME directors to call for an investigation that Hydrolevel asserts was never meant to uncover anything. To avoid any undue prejudice, Judge Weinstein instructed the jury initially that the article was not admitted for the truth of its assertions and, in his charge, directed the jury not to read it at all. Taken together, those considerations suggest that admission of the article did not consitute error.

The remaining evidentiary objections are without merit. Mere mention of the FTC investigation and Senate hearings was not impermissibly prejudicial in light of the court's strong cautionary instructions. The Bonner deposition was admitted for the limited purpose of indicating how the April 29 letter might be interpreted in the industry. Although the district court never certified Bonner as an expert, there is no doubt that Bonner, as a businessman, engineer, and potential ASME expert, was qualified to provide expert testimony. Finally, the alleged DeLeonardis hearsay regarding responses of potential customers is expected from the hearsay rule by Fed. R. Evid. 803(3). "Statements of a customer as to his reasons for not dealing with a supplier are admissible for this limited purpose . . . ." *Herman Schwabe, Inc.*

v. United Shoe Machinery Corp., 297 F.2d 906, 914 (2d Cir.), *cert. denied*, 369 U.S. 865 (1962) (citations and footnote omitted); J. Weinstein and M. Berger, Weinstein's Evidence ¶ 803(3)[03] (1979).

In addition to its evidentiary objections, ASME asserts that Hydrolevel's counsel's misstatements and emotionalism during summation require a new trial. We do not agree. Judge Weinstein's rulings regarding the summation were well within his discretion. ASME's trial counsel had ample opportunity to set the record straight during his own summation. In any event, on retrial of damages it should be made clear that misstatements of evidence and extravagant and hyperbolic language and displays of emotion by Hydrolevel's counsel must be avoided.

IV. DAMAGES

We reverse the judgment as to damages and remand for a new trial. The jury returned a verdict of $3.3 million; but, as ASME argues, the verdict was excessive and should not stand. Although the trial judge did not say in so many words that the damage verdict was excessive, he was obviously of the view that the verdict was excessive. In passing on ASME's motion to set aside the verdict and on Hydrolevel's motion for counsel fees, and in directing judgment on the verdict, the trial judge did all he could to reduce the judgment, short of granting a new trial or directing a remittitur in lieu of a new trial. First, the judge deducted the $800,000 already paid in settlements from the $3,300,000 before trebling—which, for reasons stated below, we find to be error. Next, the judge denied the application for counsel fees on the ground that with such a large judgment the

grant of counsel fees was not necessary. This also we find to be error.

Review of the record leads to the inescapable conclusion that the verdict was grossly excessive. Hydrolevel had opeated at a loss in each of the six years preceding the April 1971 letter and it continued to do so in the years following the June 1972 letter of retraction. Hydrolevel's experts were permitted to testify to long-term damage estimates extending to the year 1988 on the tenuous theory that it would take that long to recover fully from the April 1971 interpretation. Moreover, these estimates were based on the assumption that Hydrolevel would gain 10 to 25% of the market, although it had never at anytime reached 1% of the market. Thus, the experts estimated loss profits for eight years ranging from $2,358,000 to $4,406,300 and lost going concern figures in excess of $3,000,000.[8]

The estimates of the experts regarding lost sales were open to serious question for two additional reasons: they relied on lost sales in the international market due to M&M's exclusive distributorship with Honeywell—an agency relationship whose relevance to lost sales was never explained—and to alleged predatory pricing by M&M as to which there was no evidence.

But we see no need to detail all the uncertainties and errors in the presentation of the plaintiff's damage evidence. ASME's responsibility for the damage caused Hydrolevel by the conspiracy extends only to those damages incurred during the period when M&M was able to mislead customers and potential customers about

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[8] Although ASME did not object to these damage estimates when they were introduced, it did move at the close of the plaintiff's damage case to strike the plaintiff's experts' computations "as based entirely on supposition and guesswork." Judge Weinstein denied that motion.

the interpretation of the ASME code standards. The June 1972 letter was a retraction of the April 1971 interpretation. It stated:

> This will advise that there is no intent in Section IV to prohibit the use of low water fuel cutoffs having time delays in order to meet the requirements of Par. HG-605(a). This paragraph relates itself to Par. HG-602(b) which specifically delineates the location of the lowest visible part of the water gauge glass.
>
> If a means for retarding control action is incorporated in a low-water fuel cutoff, the termination of the retard function must operate to cutoff the fuel supply before the boiler water level falls below the visible part of the water gauge glass.

The draft of the retraction was sent to over 300 people active in the boiler market. Thereafter, Hydrolevel distributed the June 1972 letter to customers and potential customers. As ASME's sole contribution to the conspiracy was the April 1971 letter, a suitable retraction of the misinterpretation in the April 1971 letter was all that was required to free it from further liability for any damages caused by the conspiracy. Thus, its responsibility for damages was at an end when it provided Hydrolevel with the means of correcting the false impressions caused by the April 1971 letter which M&M had been using. Although ASME never sought at trial to limit the liability for damages by reason of the June 1972 letter, apparently because the district court framed the issues along other lines which made such a limitation seem inconsistent with the position asserted by ASME throughout the trial, the issue of limitation of damages

is available to ASME upon a retrial to determine damages.[9]

As the record on retrial may be more complete on this issue, we leave it to the district court to determine whether the jury should be instructed regarding a time limitation on damages or whether there are factual issues as to the retraction and its effectiveness which the jury must first decide before assessing damages. There are clues in Hydrolevel's summation and in DeLeonardis's testimony that Hydrolevel believed the retraction to have been somehow defective, but those arguments were never developed at trial. On asserted difficulty is that the retraction did not refer to the April 1971 letter, but rather to a later interpretation of that letter sent to Hydrolevel that was dated February 8, 1972. Although DeLeonardis suggested that further steps by ASME, such as publication of a retraction, would have helped Hydrolevel, the record shows no evidence of Hydrolevel ever having complained that the letter was insufficient or ever having requested further aid. Finally, Hydrolevel demonstrated that the second paragraph of the retraction was inserted largely at the urging of James, but Hydrolevel's argument in summation failed to describe what harm that second paragraph could have caused. The record does reveal two attempts by Hydrolevel to use the June 1972 retraction to repair its reputation. We leave the consideration of these possible claims to the trial court.

Consequently, we hold that, if on retrial no further proof is offered regarding ASME's retraction, the district court should instruct the jury to consider only damages incurred from April 1971, the date of the

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[9] Nor did ASME ever argue to the jury the significance of the June 1972 letter.

initial misrepresentation, until a reasonable time after June 9, 1972, the date of Hoyt's correction letter.

As stated above, it was error for the district court to deduct the $800,000 already paid in settlement, from the jury verdict, before trebling the verdict. The district court should first treble the amount of the jury's verdict and then subtract the $800,000 already paid in settlements. In *Flintkote Co. v. Lysfjord,* 246 F.2d 268 (9th Cir. 1957), the Ninth Circuit presented three convincing reasons for trebling damages before deducting settlement proceeds. First, the antitrust laws provide that the plaintiff should receive three times the proven actual damages. If settlement proceeds are deducted before trebling, the plaintiff's total award is less than what the law allows. Since antitrust defendants are joint tortfeasors, each is liable to complete the total deserved damages irrespective of fault. Second, as discussed above, one purpose of the trebling provision is to encourage private plaintiffs to bring suit. Any ultimate recovery totaling less than three times proven damages would weaken the statutory incentive through judicial construction. Third, deduction of settlement proceeds before trebling would discourage settlement by making litigation relatively more profitable for plaintiffs: every dollar received in settlement would cause a three dollar reduction in the judgment at trial. Accord, *Semke v. Enid Automobile Dealers Assoc.,* 320 F. Supp. 445 (W.D.Ok. 1970); *Bal Theatre Corp. v. Paramount Film Distributing Corp.,* 206 F. Supp. 708 (N.D.Cal. 1962); Note, *Contribution and Antitrust Policy,* 78 Mich. L. Rev. 889, 906 n.87 (1980). We find that reasoning persuasive.

The district court also erred in denying reasonable attorneys' fees to Hydrolevel. Section 4 of the Clayton

Act, 15 U.S.C. § 16 (1976), expressly requires such an award. *Baughman v. Cooper-Jarrett, Inc.*, 530 F.2d 529, 531 n.2 (3d Cir.), *cert. denied*, 429 U.S. 825 (1976). In determining fees, consideration should be given to any amounts that may have been paid to Hydrolevel's counsel from the settlement money or by the settling parties, and the amount of time spent in preparing the case against M&M and Hartford, both of whom were far more culpable than ASME.[10]

A restriction of expert testimony on damages, limitation of the period for which ASME is responsible, and a charge by the court which provides some specific guidance beyond mere generalities should result in a verdict more in keeping with the harm Hydrolevel suffered and ASME's unintentional participation.

We thus affirm the judgment on liability. We reverse the judgment on damages and remand for a redetermination of damages and counsel fees in accordance with this opinion. Jurisdiciton is retained.

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10 We note that the matter of contribution among joint tortfeasors in antitrust suits is before the Supreme Court in *Wilson P. Abraham Construction Corp. v. Texas Industries, Inc.*, 604 F.2d 897 (5th Cir. 1979), *cert. granted sub nom. Texas Industries Inc. v. Radcliffe Materials*, No. 79-1144 (Nov. 3, 1980). *See also Professional Beauty Supply, Inc. v. National Beauty Supply, Inc.*, 594 F.2d 1179 98th Cir. 1979); Note, *Contribution in Private Antitrust Actions*, 93 Harv. L. Rev. 1540 (1980); Note, *Contribution and Antitrust Policy*, 78 Mich. L. Rev. 890 (1980).

United States Court of Appeals

SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 22nd day of January, one thousand nine hundred and eighty-one.

HYDROLEVEL CORPORATION,
a New York Corporation,
Plaintiff-Appellee
Cross-Appellant
-against-

THE AMERICAN SOCIETY OF
MECHANICAL ENGINEERS, INC.,
a New York Corporation,
Defendant-Appellant
Cross-Appellee

No. 79-7254
79-7260

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the plaintiff-appellee-cross-appellant, Hydrolevel Corporation, etc.,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

A. DANIEL FUSARO,

A. Daniel Fusaro,
Clerk

Section 1 of the Sherman Act, 15 U.S.C. §1, as amended:

§1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Section 2 of the Sherman Act, 15 U.S.C. §2, as amended:

§2. Monopolizing trade a felony; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Section 4 of the Clayton Act, 15 U.S.C. §15, as amended:

§15. Suits by persons injured; amount of recovery; prejudgment interest

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable

attorney's fee. The court may award under this section, pursuant to a motion by such person promptly made, simple interest on actual damages for the period beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances. In determining whether an award of interest under this section for any period is just in the circumstances, the court shall consider only—

(1) whether such person or the opposing party, or either party's representative, made motions or asserted claims or defenses so lacking in merit as to show that such party or representative acted intentionally for delay, or otherwise acted in bad faith;

(2) whether, in the course of the action involved, such person or the opposing party, or either party's representative, violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings; and

(3) whether such person or the opposing party, or either party's representative, engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof.

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MAY 26 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1771

In The Supreme Court of the United States

OCTOBER TERM 1980

HYDROLEVEL CORPORATION, *Respondent-Petitioner*

v.

THE AMERICAN SOCIETY OF MECHANICAL ENGINEERS, INC., *Petitioner-Respondent*

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI OF HYDROLEVEL CORPORATION

Petitioner-Respondent The American Society of Mechanical Engineers ("ASME") respectfully submits this brief in opposition to a Petition for a Writ of Certiorari filed by Respondent-Petitioner Hydrolevel Corporation ("Hydrolevel"), Docket Number 80-1771, to review that part of a decision of the United States Court of Appeals for the Second Circuit reversing a judgment of $7.5 million and remanding for further proceedings on damages.

COUNTER-STATEMENT OF THE CASE

For its counter-statement of the case, ASME respectfully refers the Court to the Statement of the Case contained in ASME's Petition for a Writ of Certiorari, Docket Number 80-1765, at pages 2 through 10.

REASONS FOR DENYING THE WRIT

Although affirming the jury's finding of liability against ASME in this case, the Second Circuit panel reversed the damages award and remanded for further proceedings, noting that the damages verdict "was grossly excessive," was unsupported by sufficient evidence and may have been based upon irrelevant or unconnected facts. A-22.* For the reasons that follow, it is clear that the panel's conclusion in this regard was eminently sound and correct, and that there is no reason for this Court to exercise its discretion to review the damages portion of the decision.

First, Hydrolevel incorrectly states the basis for the panel's reversal. The real basis for the reversal was that there simply was no credible or relevant evidence to support the view that Hydrolevel, a mismanaged and undercapitalized company which had never in its entire existence made a profit,

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* Citations to the Court of Appeals opinion in *Hydrolevel Corp. v. The American Society of Mechanical Engineers, Inc.*, 635 F.2d 118 (2d Cir. 1980) as it appears in the Appendix to ASME's Petition for Certiorari are in the above form.

had suffered damages in the amount of $3.3 million. *See* A-21 to A-22. The predominant theme of Hydrolevel's Petition is that the damages verdict was reversed because of a new theory of "relative" or "comparative culpability." *See* Hydrolevel Petition, at pp. 9, 10, 11, 12 and 17. In fact, in its entire discussion of the damages award, the panel never once discussed the relative culpability of ASME compared with its co-defendants (*see* A-21 to A-25); instead, the sole mention of this concept in the opinion is on the final page thereof, in the context of detailing the consideration to be given in assessing appropriate attorneys' fees to "the amount of time spent in preparing the case against M&M and Hartford, both of whom were far more culpable than ASME." A-26 (footnote omitted). In short, the Second Circuit panel followed its own precedent (and common sense) by holding, in effect, that a damages verdict should not stand if it "rested on assumptions that ranged from demonstrably false to unreasonable and contrary to common sense." *Autowest, Inc.* v. *Peugeot, Inc.*, 434 F.2d 556, 566 (2d Cir. 1970); *see also Herman Schwabe, Inc.* v. *United Shoe Machinery Corp.*, 297 F.2d 906 (2d Cir.), *cert. denied*, 369 U.S. 865 (1962). This routine application of settled law to the record in this case provides no basis for this Court to exercise its discretionary jurisdiction.

Second, Hydrolevel's lengthy discussion of the defense of "withdrawal" in conspiracy cases also misinterprets what the panel held.* Once it had determined that the damages

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* Hydrolevel also asserts that ASME "never pleaded or argued" a theory of "retraction" or "withdrawal" throughout the entire District Court and appellate proceedings. This is profoundly misleading. ASME persistently argued in the District Court and the Court of Appeals that no evidence showed its intentional participation in a conspiracy and that its actions at all times were entirely proper and in accord with its established procedures. As a matter of logic and of common sense, this argument necessarily encompasses the less extensive proposition that ASME's participation, if any, was limited in duration. More specifically, ASME argued in both its principal and reply briefs to the Court of Appeals that the June 9, 1972 letter was precisely the "corrective" measure requested by Hydrolevel and constituted an appropriate response to M&M's misuse of the April 29, 1971 letter. A. Br. 22-23; A.R. Br. 3. In addition, ASME argued at length during the appellate proceedings that the June 9, 1972 "retraction" letter showed ASME's deliberate effort to cure whatever damages may have been caused, even inadvertently, by the April 29, 1971 letter.

verdict was unsupported by appropriate evidence and thus should be reversed, the Court discussed certain limits to the retrial on damages. Since ASME's sole contribution to the conspiracy was the April 1971 letter, the panel concluded, "a suitable retraction . . . was all that was required to free it from further liability for any damages caused by the conspiracy. Thus, its responsibility for damages was at an end when it provided Hydrolevel with a means of correcting the false impressions caused by the April 1971 letter which M&M had been using." A-23. Thus, the panel described precisely how ASME had withdrawn from the conspiracy and remanded for a retrial on the amount of damages. While the panel left to the District Court the determination of whether there are additional "factual issues as to the retraction and its effectiveness" (A-24), there can be no doubt that, in the absence of additional facts, the June 1972 letter constituted an affirmative and unequivocal act to disavow or defeat the purpose of the conspiracy—in short, a complete withdrawal.

Finally, and most importantly, Hydrolevel does not raise any issue as to which there is a conflict among the federal Courts of Appeal or which is of any general significance in the administration of federal antitrust laws. As emphasized by the decisions of this Court upon which Hydrolevel purports to rely, a jury in an antitrust case "may not render a [damages] verdict based on speculation or guesswork." *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251, 264 (1946). Rather, the federal appellate courts are directed to reverse excessive antitrust awards if, "on the entire evidence, [the courts are] left with the definite and firm conviction that a mistake has been committed." *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969), quoting from *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395 (1948). In this case, the appellate panel reviewed the record and concluded for several reasons that a "mistake had been committed," stating: "Review of the record leads to the inescapable conclusion that the verdict was grossly excessive." A-22.

Thus, unlike the important legal issues raised in ASME's Petition for review of the portion of the panel's opinion regarding standards for antitrust liability, which will affect

virtually every antitrust proceeding involving a corporate defendant and which will have a profoundly adverse effect on many voluntary membership organizations, Hydrolevel is complaining, in essence, only about the panel's characterization of the specific facts of this case. These limited factual issues do not warrant this Court's review of the damages portion of the decision.

CONCLUSION

Hydrolevel's Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM 1980

HYDROLEVEL CORPORATION,
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v.

THE AMERICAN SOCIETY OF MECHANICAL ENGINEERS, INC.,
Respondent.

On Petition For a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF OF PETITIONER

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IN THE

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HYDROLEVEL CORPORATION,
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On Petition For a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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REPLY BRIEF OF PETITIONER

ARGUMENT

The *Brief in Opposition To Petition For a Writ of Certiorari to the United States Court of Appeals for the Second Circuit,* filed by respondent The American Society of Mechanical Engineers ("ASME Brief"), makes two points that require comment.

First, the ASME Brief expressly argues, *for the first time in this litigation,* that the June 9, 1972, ASME letter to petitioner Hydrolevel Corporation ("Hydrolevel") constituted "a complete withdrawal" from the conspiracy to monopolize, a conspiracy which the ASME concedes had the purpose and effect of destroying Hydrolevel. (ASME Brief at p. 3). The ASME thus recognizes that the Court of Appeals' opinion, which created a new conspiracy defense of "retraction," is not legally supportable. Instead, the ASME now tries to fit its June 1972 letter, and the Court of Appeals' ruling on the issue of damages, into the well-known doctrine of "withdrawal." As pointed out at

pages 12-13 of Hydrolevel's Petition, there is absolutely no way that the ASME letter can meet the strict legal standards of "withdrawal" under long-standing and direct holdings of this Court and, in any event, the invokation of that defense would have had to be *pleaded* (which it was not) and presented to the jury as a factual issue (which it was not). Such a revolutionary rewriting of the precedents established by this Court should not be left unreviewed.

A second point made by the ASME Brief deserves mention. Attempting to push the Second Circuit's new "retraction" theory out of the limelight, the ASME characterizes the "real basis" for the Court of Appeals' reversal of the jury's damage award as "that there simply was no credible or relevant evidence to support the" damage award. (ASME Brief at p. 1). Matters of credibility, of course, are for the jury to resolve, not the Court of Appeals. Moreover, the ASME neglects to point out that it has *never* before challenged the relevance of Hydrolevel's damage evidence. Indeed, *the ASME did not object to its admissibility at trial* and *the ASME's own expert confirmed its reasonableness.* That a Court of Appeals, under these circumstances, can conclude that Hydrolevel's damage estimates were "open to serious question" and, on that basis, reverse a well considered jury award, is directly contrary to this Court's holding in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969).

After the filing of Hydrolevel's Petition on April 22, 1981, this Court rendered its opinion in *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 49 U.S.L.W. 4537 (May 26, 1981), a case that was referred to at page 10 of Hydrolevel's Petition. The Court's opinion in that case fully supports the position taken by Hydrolevel in the Courts below and in this Petition.

> The very idea of treble damages reveals an intent to punish past, and to deter future, unlawful conduct, not to ameliorate the liability of wrongdoers. The absence of any reference to contribution in the legislative history or of any possibility that Congress was concerned with softening the blow on joint wrongdoers in this setting makes examination of other

> factors unnecessary. We therefore conclude that Congress neither expressly nor implicitly intended to create a right to contribution. If any right to contribution exists, its source must be federal common law.

Id. at 4540 (citations and footnotes omitted). The Court of Appeals in the instant case has attempted to fashion a new doctrine of federal common law that would permit a participant in a conspiracy to monopolize to limit its liability for the ensuing damage by issuing a letter which does not fit within the settled law pertaining to withdrawals from a conspiracy. Whether such a new doctrine is denominated "retraction," "withdrawal," or "contribution," it amounts to the same thing: a startling new concept in the law of antitrust conspiracy which deserves the attention of this Court.

CONCLUSION

For these reasons, as well as those set forth in the Petition, Hydrolevel's Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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